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IN THE

Supreme Court of the United States

October Term, 1953

No. 663

UNITED STATES OF AMERICA, *ex rel.*
JASPERE J. MATRANGA,

Petitioner,

AGAINST

ARGYLE J. MACKEY, Commissioner of Immigration & Naturalization, EDW. J. SHAUGHNESSY, Director of Immigration & Naturalization for the District of New York, and/or Whomsoever may have the custody of the body of JASPERE J. MATRANGA,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Earl C. Warren, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Jaspere J. Matranga, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the lower court's dismissal of a writ of habeas corpus issued in behalf of your petitioner.

Opinion Below.

The opinion of the Court of Appeals has not yet been officially reported, but is set forth at the beginning of page 214 of the record. The opinion of the District Court is reported at 115 F. Supp. 45, and is set forth in the record commencing at page 47.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 4, 1954 (R. 217). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Where an alien is entitled to a deportation hearing conforming to procedural due process, and the administrative record, submitted to the Court, *reveals on its face* that matters outside that record were considered, has he been denied a fair and impartial hearing?

2. Has there been an administrative abuse of discretion in a deportation hearing where the record reveals on its face that matters outside that record not material to national security were considered in rejecting an alien's application for suspension of deportation?

3. Where a federal administrative agency fails to comply with its own published regulations has there been a fair hearing?

Statutes and Regulations Involved.

Section 19(c) of the Immigration Act of 1917 (62 Stat. 1206; 8 U. S. C. 155(c)), as amended, provides in pertinent part as follows:

"In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

The Code of Federal Regulations promulgated under the Immigration Act of 1917, and in effect at the time of the hearing in this matter, provided in part as follows:

8 C. F. R. 151.2 *Conduct of Hearings*—(1951 Supp.).

(b) *Hearing Examiners; general duties.* The hearing examiner shall conduct a fair and impartial hearing. He shall not consult with any person or party on any fact in issue unless upon notice and opportunity for all persons concerned to participate * * *.

(c) *Hearing Officer; specific duties.* * * * The hearing officer shall thereafter present all available evidence, including the interrogation of the alien and all witnesses presented concerning * * * (4) factors bearing upon statutory eligibility for discretionary relief, * * *.

8 C. F. R. 151.3 *Contents of record; evidence*—(a) *Record.*

> The transcript of testimony and exhibits, together with all written motions and other papers and requests filed in the proceeding, shall constitute the exclusive record for the recommended decision of the hearing examiner.

8 C. F. R. 151.5 *Recommended decision*—(a) *Preparation by hearing officer of written recommended decision.*

> * * * the hearing officer shall, as soon as practicable after conclusion of the hearing * * * prepare in writing his recommended decision, signed by him, which shall set forth a summary of the evidence adduced, a ruling upon each of the matters which may be submitted pursuant to Section 151.4, and his proposed findings of fact and conclusions of law as to deportability. If the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation, the recommended decision shall also contain a separate summary, ruling, proposed findings and conclusions as to the alien's statutory eligibility under the provisions of section 19(c) of the Immigration Act of 1917, as amended, for such relief. * * * "

Section 405(a) of Public Law 414 (66 Stat. 280), known as the Immigration and Nationality Act of 1952, provides:

> "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceeding * * * done or existing at the time this Act shall take

effect; but as to all such * * * proceedings * * * the statute * * * repealed by this Act are, unless otherwise specifically provided herein, hereby continued in force and effect. * * * An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of the enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

Statement.

The petitioner seeks through his application for a writ of habeas corpus a judicial review of the legality of the administrative deportation order entered against him on May 11, 1953.

The petitioner is a native and citizen of Italy who first entered the United States from Canada on December 25, 1925 (R. 163, Par. 2). Following such entry, he resided continuously in the State of Illinois until 1945. From 1945 to the present date, he has had his residence and domicile in Upland, California (R. 164, Par. 2). He has a wife and two daughters all of whom are citizens of the United States by naturalization.

In the year 1942, while the petitioner was residing in Chicago, Illinois, deportation proceedings were instituted against him by the Immigration and Naturalization Service, Department of Justice (R. 167, Par. 2). In that proceeding, the petitioner applied for the privilege of voluntary departure and preexamination. Having proved and established that he was a person of good moral character for more than five years, and that he was married to a citizen of the United States, the discretionary relief of voluntary departure and preexamination was granted

(8 C. F. R. 142.2). Pursuant to such authorization, the petitioner applied for an immigration visa at the American Consulate General in Canada (R. 67).

The American Consulate General in Canada denied the petitioner's application for an immgiration visa because, according to some document obtained by the State Department, the petitioner had in 1930 been convicted of some offense allegedly committed in Italy in 1928 (R. 73). Such sentence having been pronounced against the petitioner in absentia (R. 73). It is respectfully pointed out that the petitioner had never returned to Italy since 1925.

After rejection of his application by the American Consulate General in Canada, the petitioner after a six day absence returned to his home and residence in the United States (R. 67). At the time of his return he presented an alien border-crossing card issued by the Immigration and Naturalization Service prior to his departure (R. 67).

The case of the petitioner remained dormant until April 6, 1951 at which time he was served with a new warrant of arrest issued by the Immigration and Naturalization Service on April 11, 1947 (R. 57). The new warrant charged the petitioner with violation of the Immigration Act of May 24, 1924, in that on March 17, 1946 he entered the United States without being in possession of the required immigration visa (R. 58). By stipulation, it was agreed that the true date of return of the petitioner to the United States was December 17, 1945 (R. 69).

Starting on March 18, 1952 a new deportation hearing was conducted by the Immigration and Naturalization Service (R. 57, et seq.). In this new proceeding, the petitioner applied for the relief of suspension of deportation and/or, in the alternative, for voluntary departure in lieu of deportation, on the ground that the petitioner had re-

sided in the United States for more than seven years; that he was residing in the United States on July 1, 1948; and that his deportation would cause economic hardship to his spouse, a citizen of the United States (R. 78).

The petitioner states that he has never been convicted of any crime whatsoever; that he is not and never has been a Communist, Fascist, Fallangist or Nazi; that he has never been a sympathizer of such subversive and dictatorial ideologies; and that he is and has been a person of good moral character, law abiding, enjoying the best reputation in the community where he has resided (R. 4). The Immigration hearing indicates the petitioner was arrested on three occasions, 1931, 1932 and 1933, for disorderly conduct, none of which resulted in convictions (R. 164, Par. 1).

In a decision dated April 2, 1952, the hearing officer, without making any specific findings of fact or conclusions of law, held that the petitioner "has not affirmatively established that he is eligible for any of the discretionary relief provided by Section 19(c) of the Immigration Act of 1917, as amended" (R. 167, Par. 4).

In an order dated May 23, 1952, the Assistant Commissioner, Immigration and Naturalization Service, adopted the opinion of the hearing officer and ordered the petitioner deported from the United States (R. 179). In a decision dated May 11, 1953, the Board of Immigration Appeals ordered the appeal dismissed (R. 186, Par. 2).

In the closing paragraph of its decision, the Board of Immigration Appeals stated that the "evidence in the file, some of it confidential in nature, establishes to our satisfaction that the alien is not a worthy subject for the administrative grant of suspension of deportation" (R. 186, Par. 1). On the 12th day of May, 1953, the District Director of the Immigration and Naturalization Service

at Los Angeles, California issued a warrant of deportation (R. 187). A motion for reconsideration was filed on May 20, 1953 objecting to the use of confidential information in reaching a determination in this matter (R. 188). At the same time, an application for a stay of deportation pending such decision was filed with the appropriate administrative official (R. 11, Par. 1). The petitioner's attorneys were notified and received assurances that deportation of the petitioner was not imminent and that advance written notice would be given prior to any such action (R. 11, Par. 1). However, in spite of such assurance and promise, and without notification to anyone, the Immigration and Naturalization Service transferred the petitioner from California to New York for the purpose of executing the warrant of deportation (R. 29, Par. 4). It was not until after the entire matter had been submitted to the United States District Court that petitioner's counsel received a copy of the decision on the motion for reconsideration by the Board of Immigration Appeals dated June 17, 1953. In that opinion, the Board of Immigration Appeals admits that "We did consider evidence not of record and confidential in nature" (App. Pg. 16).

The respondent admits that matters outside of the record were considered in denying the petitioner's application for suspension of deportation (R. 32, Par. 1). The District Court dismissed the writ of habeas corpus upon the ground that the Board of Immigration Appeals' "consideration of evidence outside the record did not render its determination unlawfully" (R. 54, Par. 1). The Court of Appeals affirmed (R. 217).

Reason for Granting the Writ.

1. The decision of the Court of Appeals holding that the Immigration and Naturalization Service and the Board of Immigration Appeals may, in a deportation hearing, consider matters outside of the record, involves an important question of federal law which apparently has not been, but should be, settled by this Court.

This important question was presented but was not specifically considered by this Court in the case of *Accardi, United States ex rel.* v. *Shaughnessy,* decided March 15, 1954.

2. The decision of the said Court of Appeals as to procedural due process, by holding that the administrative authorities may consider matters outside of the hearing record, is a decision on a federal question in a way probably in conflict with applicable decisions of this Court.

Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.

Japanese Immigrant Case (*Yamataya* v. *Fisher*), 189 U. S. 86, 100, 101 (1903);
Wong Yang Sung v. *McGrath,* 339 U. S. 33, 49, 50 (1950);
Kwong Hai Chew v. *Colding,* 334 U. S. 590, 598 (1953);
Shaughnessy v. *Mezei,* 345 U. S. 206, 212 (1953).

3. The decision of the Court of Appeals in holding that consideration of matters outside of the record did not constitute an abuse of discretion, involves an important question of federal law which appears to be in conflict with other decisions of this Court.

Gegiow v. *Uhl,* 239 U. S. 3 (1915);
Kwock Jan Fat v. *White,* 253 U. S. 454, 464 (1920);
Joint Anti-Fascist Refugee Comm. v. *McGrath,* 341 U. S. 123 (1951).

4. The decision of the Court of Appeals holding that the administrative decision complied with the regulations in effect at the time of said hearing is in conflict with the decisions of this Court in the cases of *Mahler et al.* v. *Eby,* 264 U. S. 32, 43 (1924) and *Bridges* v. *Wixon,* 326 U. S. 135, 154 (1945).

CONCLUSION.

For the reasons set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated: March 23, 1954.

Alfred E. Santangelo,
Joseph S. Hertogs,
Attorneys for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinion of the District Court (R. 47) is reported in 115 F. Supp. 45. The opinion of the Court of Appeals for the Second Circuit has not yet been officially reported.

II.

Jurisdiction.

1. The writ of certiorari is applied for under Rule 38 of this Court and jurisdiction is invoked under 28 U. S. C. 1254 (1), and is the proper remedy.

> *Accardi* v. *Shaughnessy,* decided by this Court March 15, 1954.

2. The opinion and judgment of the Court of Appeals was filed on February 4, 1954.

III.

Statement of the Case.

A full statement of the case has been given in the petition for writ of certiorari, *supra,* and in the interest of brevity is not here repeated.

IV.

Specification of Errors.

1. The Court of Appeals erred in its refusal to recognize that consideration of matters outside of the deportation record constituted denial of due process of law.

> (a) Consideration of matters outside of the record resulted in an unfair hearing and denial of procedural due process.
>
> (b) Consideration of matters outside of the record in application for discretionary relief is an abuse of discretion.

2. The Court of Appeals erred in holding that failure of the administrative agency to comply with its own regulation was not denial of due process of law.

V.

Argument.

The immigration administrative decision is subject to judicial review where the proceedings have not conformed to the traditional standards of fairness required by the due process of law clause of the Fifth Amendment to the Constitution of the United States. *Japanese Immigrant Case,* 189 U. S. 86; *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33; *Kwong Hai Chew* v. *Colding,* 334 U. S. 590. Or where there has been arbitrariness or abuse of discretion by the administrative agency. *Low Wah Suey* v. *Backus,* 225 U. S. 460; *Kwock Jan Fat* v. *White,* 253 U. S. 454 (1920); *Carlson* v. *Landon,* 342 U. S. 524 (1952); *Yaris* v. *Esperdy,* 202 F. 2d 109, 112 (2 Cir., 1953). The same general rule applies where the administrative authority commits an error of law. *Gegiow* v. *Uhl,* 239 U. S. 3 (1915); *Kessler* v. *Stecker,* 307 U. S. 22 (1939); *Bridges* v. *Wixon,* 326 U. S. 135 (1945); *Fong Haw Tan* v. *Phelan,* 333 U. S. 6 (1948); *McGrath* v. *Kristensen,* 340 U. S. 162 (1950).

We have amply defined by the cases cited the power of the Courts to protect the rights of individuals in conformity with the fundamental principles of justice embraced within the concepts of the Constitution of this nation. Applying those standards to the case at bar, has this petitioner stated a cause of action?

I.

The Court of Appeals erred in its refusal to recognize that consideration of matters outside of the deportation record constituted denial of due process of law.

A. Unfair Hearing.

Petitioner's case was not judged on the record made but, obviously, as admitted by the respondent, on something which is not in the record. The decision was based on unrecorded evidence or information, the nature and importance of which is yet unknown to the petitioner. It is also obvious that the relief was denied by the Hearing Officer, the Commissioner, and the Board of Immigration Appeals, not because of the evidence reflected in the record, but because of directions and instructions received by the several agencies of the government from the Attorney General.

Deportation proceedings must be fair and consideration of evidence for discretionary relief is an integral part of the deportation hearing. Generally speaking, the elements of a fair hearing include adequate notice of the charges, reasonable opportunity to meet those charges and to be represented by counsel, confrontation with opposing evidence, the privilege of cross-examining witnesses and presenting evidence, and a decision based on evidence in the record. *Whitfield* v. *Hanges,* 222 Fed. 745 (8 Cir., 1915).

Injection into the case of evidence or information which did not form a part of the official record, undisclosed to the petitioner until receipt of the Board of Immigration Appeals decision, deprived the petitioner of an opportunity to examine or refute such evidence or information.

It has been held that matters outside of the record may be utilized in certain instances. Such is the case of exclusions without a hearing. *Knauff* v. *Shaughnessy,* 338 U. S. 53 (1950); *Shaughnessy* v. *Mezei,* 345 U. S. 206 (1953). However, even in the case of *Shaughnessy* v. *Mezei,* at page 212, this Court stated:

> "It is true that aliens who have passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."

In *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, a case involving an alien applicant for admission to the United States who had been denied a hearing by the Immigration and Naturalization Service, this Court at page 596, 597 held:

> "He may not be deprived of his life, liberty or property without due process of law. Although it may be later established, as respondents contend, that petitioner can be expelled and deported, yet before his expulsion, he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal. Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard. For example, he is entitled to a fair chance to prove mistaken identity. At the present stage of the instant case, the issue is not one of exclusion, expulsion or deportation. It is one of legislative construction and of procedural due process."

In *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49, this court stated:

> "The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every enactment of that body. It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had entered clandestinely and who had been here some time even if illegally."

In *U. S. ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369 (2 Cir., 1948; cert. denied 333 U. S. 876), it was said:

> "Since the regulations of the Attorney General have set up a quasi-judicial procedure for the determination of issues bearing on the propriety of exercising his power to suspend deportation under 8 U. S. C. A., section 155 (c), we assume that the alien is entitled to procedural due process in the conduct of such hearing, and we assume further that, if the Immigration Service issues a warrant of deportation without according the alien such procedural due process, the warrant can be challenged on this ground in *habeas corpus* proceedings."

In *Alexiou* v. *McGrath,* 101 F. Supp. 421 (Dist. of Col., 1951) in discussing this problem the court stated at page 424:

> "Once the Attorney General has established the procedure affording an opportunity for a fair hearing as has been done here, then I do not believe his discretion can be exercised arbitrarily or capriciously in complete disregard of what appears on the record. The proceedings were infected with unfairness by a consideration of matters outside the record. Any action based on such an unfair hearing

is a nullity. If that were not so then we would be injecting into our system of government the very principles of totalitarianism which we are today struggling to strike down." • • •

"The hearing on eligibility for suspension is tainted, *ab initio,* with unfairness, because evidence not of record was considered. But for that evidence it is wholly speculative whether the requisite finding would have been made. See *Bridges* v. *Wixon, supra.* The charge of lack of due process cannot be avoided by a subsequent attempt at compartmentalization."

Arakas v. *Zimmerman,* 200 F. 2d 322, 324 (3 Cir., 1952), states:

"We agree entirely with holding in *Alexiou* v. *McGrath,* D. C. 1951, 101 F. Supp. 421 • • •."

In *U. S. ex rel. Giacalone* v. *Miller,* 86 F. Supp. 655, 657 (S. D. N. Y. 1949), Judge Rifkind overruled whatever contrary opinion he might have expressed in *U. S. ex rel. Von Kleczkowski* v. *Watkins,* 71 F. Supp. 429 (S. D. N. Y. 1947). In the *Giacolone* case, Judge Rifkind stated:

"• • • It is now accepted that procedural due process must be observed in a hearing even though the alien is invoking relief which is, in any event afforded only at official discretion. See *United States ex rel. Weddeke* v. *Watkins,* 2 Cir. 1948, 166 F 2d. 369, 371, certiorari denied 1948, 333 U. S. 876, 68 S. Ct. 904, 92 L. Ed. 1152; *Kavadias* v. *Cross,* D. C. N. D. Ind. 1948, 82 F. Supp. 716, 718."

Kavadias v. *Cross,* 82 F. Supp. 716 (N. D. Ind. 1948; reversed upon other grounds, 177 F 2d 497), followed the rule of *U. S. ex rel. Weddeke* v. *Watkins, supra,* that dis-

cretionary relief must be exercised upon the evidence of record.

Where a hearing is authorized—and this is so even in the case of arriving aliens—it must be a fair hearing on record evidence. *Johnson* v. *Tertzag,* 2 F. 2d 40, 42 (1 Cir., 1924); *Yip Wak* v. *Nagle,* 7 F. 2d 426 (9 Cir., 1935); *Brandt* v. *District Director,* 40 F. Supp. 371 (S. D. N. Y., 1941).

We respectfully submit that such practices should be unanimously condemned and that this Court should once again reaffirm the principle that an alien is entitled to a fair hearing that conforms to procedural due process.

B. Abuse of Discretion.

The petition herein alleges that confidential matters outside of the official record were utilized in deciding to deny this petitioner's application for suspension of deportation. The use of such information was not limited solely to exercise of administrative discretion but concurrent with consideration of petitioner's eligibility for such relief.

Congress in enacting Section 19(c) of the Immigration Act of 1917, as amended, reposed in the Attorney General the discretion to suspend deportation. By regulation the Attorney General has delegated such authority to the Board of Immigration Appeals. However, that authority is not an absolute unbridled power.

In *Kwock Jan Fat* v. *White,* 253 U. S. 454, after discussing the great power of the Secretary of Labor over Chinese immigrants, the court said:

> "* * * is a power to be administered not arbitrarily or *secretly,* but fairly and openly under the restraints and principles of free government ap-

> plicable where the fundamental rights of men are involved, regardless of their origins or race. It is the province of the courts, in proceedings for review * * * to prevent abuse of this extraordinary power, * * *." (Emphasis supplied.)

Due process of law assures, at the least, that one entitled thereto will be afforded those procedures which accord him the "rudiments of fair play." *Chicago, M & St. P. R. Co.* v. *Polt,* 232 U. S. 165; *Morgan* v. *United States,* 304 U. S. 1.

In the *Morgan* case, *supra,* this Court stated:

> "While we are not dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding * * * places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them * * *."

There is no point in having an administrative hearing, and preserving a full record thereof, if it is possible for an administrative agency to exercise its discretion on matters outside of the record. There, hearing would be nothing but a sham.

Any delegated executive power is subject to conformance with the due process clause of the Fifth Amendment. *Ex parte Endo,* 323 U. S. 283. Any exercise of discretion must be consistent "with the fundamental principles of justice embraced within the conception of the due process of law." *Tang Tung* v. *Edsell,* 223 U. S. 673; *Joint Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123; *Carlson* v. *Landon,* 342 U. S. 524.

The discretion granted to an administrative official is not one of arbitrary fiat. We have a government of laws and not men. No adverse decision can be sustained without legal justification. This granted power is likewise subject to the limitations imposed by the regulations which have the force and effect of law (see part A, *supra*).

"The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus.*" *Gegiow* v. *Uhl,* 239 U. S. 3 (1915).

In *Stack* v. *Boyle,* 342 U. S. 1, Mr. Chief Justice Vinson warned that we should not "inject into our system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute." This warning is particularly appropriate in the setting of the instant case.

Improper and illegal consideration of matters outside of the deportation record so tainted the entire proceeding that the decision of the Board of Immigration Appeals is an abuse of discretion.

II.

The Court of Appeals erred in holding that failure of the administrative agency to comply with its own regulations was not denial of due process of law.

Hearings on the deportation charge and the application for suspension of deportation were held by a hearing officer of the Immigration and Naturalization Service at Los Angeles, California, on March 18 and April 2, 1952 (R. 57). On the day of the last hearing, the hearing of-

ficer found the petitioner deportable and not eligible for discretionary relief (R. 161). On May 23, 1952, the Assistant Commissioner, Immigration and Naturalization Service, adopted the hearing officer's findings as deportability, that the facts of the case do not warrant the exercise of any discretionary relief, and that the petitioner be deported from the United States pursuant to law (R. 179). On May 11, 1953, the Board of Immigration Appeals affirmed upon the basis of confidential information. No findings of fact nor conclusions of law pertaining to eligibility for suspension of deportation were made by either the hearing officer, the Assistant Commissioner, or the Board of Immigration Appeals.

Regulations which were in full force and effect at the time of the administrative hearing and at the time the petitioner filed his application for suspension of deportation provided that a hearing officer "shall conduct a fair and impartial hearing" and "shall not consult with any person or party on any fact in issue." 8 C. F. R. 151.2(b); 1951 supp. "The hearing officer shall thereafter present all available evidence" including "factors bearing upon statutory eligibility for discretionary relief". 8 C. F. R. 151.2(c); 1951 supp. "The transcript of testimony and exhibits, * * * shall constitute the exclusive record". 8 C. F. R. 151.3; 1951 supp. The hearing officer "shall set forth a summary of the evidence adduced" and if "the alien has applied * * * for suspension of deportation, the recommended decision shall also contain a separate summary, ruling, proposed findings and conclusions as to the alien's statutory eligibility under the provisions of Section 19(c) of the Immigration Act of 1917, as amended, for such relief".

The foregoing regulations had the force and effect of law and were binding upon the Immigration and Naturalization Service in the conduct of the deportation hearing.

Bilokumsky v. *Tod,* 263 U. S. 149; *Bridges* v. *Wixon,* 326 U. S. 135. These rules were designed as safeguards against essentially unfair procedures. *Bridges* v. *Wixon, supra.* Those regulations imposed a duty upon the Immigration and Naturalization Service to accord a fair hearing to an alien on the issue of discretionary relief. *In the Matter of Alexiou,* Vol. III, I & N Dec. 714 (Aff. by Atty. Gen., Nov. 16, 1949; Rev. by Atty. Gen., Dec. 17, 1949; Reversed *Alexiou* v. *McGrath,* 101 F. Supp. 421).

The Immigration and Naturalization Service acted improperly and contrary to those regulations. First, they considered evidence not of record and, secondly, they failed to make any findings of fact or conclusions of law as to the petitioner's statutory eligibility under Section 19(c) of the Immigration Act of 1917, as amended.

In the instant case, we have a decision of the Board of Immigration Appeals wherein the Board admits that the hearing officer made no conclusive findings as to the petitioner's eligibility for the relief sought based upon his more than seven years residence in the United States, but dismissed the appeal, not on the record, but on alleged confidential information (R. 184, Par. 2).

Consideration of matters outside of the record violated the specific language of 8 C. F. R. 151.3 that the "transcript of testimony and exhibits * * * shall constitute the exclusive record." Compare also the language of 8 C. F. R. 151.2(b) and (c).

In *S. E. C.* v. *Chenery Corp.,* 318 U. S. 80 at page 94, the Supreme Court said:

> "* * * the orderly functioning of process of review requires that the *grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.*" (Emphasis supplied.)

Where a statute provides that the administrative authority must make a finding as a prerequisite to an adjudication, the necessity of such finding is basic and jurisdictional and requires that the finding be made before any decision on the subject matter could have any effect. In the case of *Mahler et al.* v. *Eby,* 264 U. S. 32, the statute (Act of 1920, 41 Stat. 593) required that the Secretary of Labor, after a hearing, find an alien an "undesirable resident" of the United States before an order for the alien's deportation on that ground could take effect. In that case, Mr. Chief Justice Taft said:

> "But the Secretary made no express finding, so far as the warrant of deportation discloses. * * * The defect is jurisdictional. There is no authority given to the Secretary to deport except upon his finding after a hearing that petitioners were undesirable residents. There is no evidence that he made such a finding. * * *
>
> "The character of the defect is such that we cannot relieve ourselves from its consideration. The warrant lacks the finding required by the statute and such a fundamental defect we should notice. It goes to the existence of the power on which the proceedings rests. It is suggested that if the objection had been made earlier it might have been quickly remedied. There was no chance for objections afforded the petitioners until, after the warrant issued, in the petitions for *habeas corpus.*"

In *Florida* v. *United States,* 282 U. S. 194 (1931), this court at page 215 said:

> "The question is not merely one of the absence of elaboration or of a suitable complete statement of the grounds of the Commission's determination,

> * * * but of the lack of the basic or essential findings required to support the Commission's order."

This Court in *Bridges* v. *Wixon, supra,* at page 154, stated:

> "Here the liberty of an individual is at stake. Highly incriminating statements are used against him—statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation penalty —at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedures by which he is deprived of that liberty not meet the essential standards of fairness."

There was confidential information not of a security nature utilized by the Immigration and Naturalization Service and the Board of Immigration Appeals in the case at bar. This was contrary to the specific language of the regulations then in effect.

The regulations contemplated findings of fact. In failing to disclose the basis for the adverse decisions the administrative officers acted contrary to law.

Conclusion.

The liberty of the petitioner is at stake—he has been ordered deported from the United States. In reaching that decision an administrative agency of this government relied upon confidential information not of record.

The drastic nature of the penalty of deportation has been noted in many cases. In *Ng Fung Ho* v. *White,* 259 U. S. 276, 285, Mr. Justice Brandeis said that deportation:

> "May result also in loss of both property and life; or of all that makes life worth living."

In *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 50, Mr. Justice Jackson, in a case involving a Chinese seaman who had deserted his vessel, said:

> "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."

To prevent abuse of the Attorney General's extraordinary powers over the lives and destinies of our foreign born, judicial intervention is appropriate herein. Petitioner should be accorded a *de novo* hearing which complies with procedural due process of law. The decision should be reversed with directions that a writ of *habeas corpus* issue.

Respectfully submitted,

Alfred E. Santangelo,
Joseph S. Hertogs,
Attorneys for Petitioner.

APPENDIX.

DECISION OF BOARD OF IMMIGRATION APPEALS.

June 17, 1953

A-5760896 — Los Angeles

In the Matter of:

JASPERE J. MATRANGA aka Gaspare Matranga
alias Joe Vitale

IN DEPORTATION PROCEEDINGS.

In Behalf of Respondents: Marcus J. Pedersen, Esq.

Suite 308, 448 So. Hill St.
Los Angeles, California

DEPORTABLE: Act of 1924—no immigration visa.

Motion has been made to reconsider an order entered by this Board May 11, 1953 directing respondent's deportation on the above stated charge. A brief in support of the motion has been filed. Counsel urges that the issue of discretionary relief be reconsidered and that if upon reconsideration the privilege of suspension of deportation is denied, the respondent be granted the privilege of voluntary departure.

The facts of the case have been fully stated in prior opinions. Briefly, they relate to a native and citizen of Italy, male, 55 years of age, married who last entered the United States at the port of Detroit, Michigan on December 17, 1945. He has been found subject to deportation on a charge laid under the immigration Act of 1924 in that at the time of his last entry he did not possess an

immigration visa although intending to reside permanently in the United States.

Counsel's brief in support of motion cites no authority for the points he raises. The substance of counsel's contention is that respondent has been denied a fair hearing and that this Board failed to consider respondent's eligibility for suspension of deportation by reason of having resided in the United States for more than 7 years or his eligibility for voluntary departure.

Concerning the question of a "fair hearing" counsel concedes in his brief "that respondent is aware that confidential information may be considered on an application for discretionary relief where such confidential information might, if disclosed, injure the United States of America * * *." *We did consider evidence not of record and confidential in nature. We found that it established to our satisfaction that respondent "is not a worthy subject for the administrative grant of suspension of deportation".* We cited authority for the use of evidence outside the record touching upon the issue of qualifications for the discretionary relief sought. There is no allegation on the part of counsel that respondent was denied procedural due process relative to the issue of deportability or that ordinary standards of fairness were not observed during the hearing on the issue of discretionary relief. Inasmuch as the respondent is invoking relief which is, in any event, afforded only at official discretion, a finding of statutory eligibility under Section 19(c) of the 1917 Act need not be decided.

Counsel states in his brief that respondent has been "tried and convicted by rumor" and refers to the fact that press reports of the Board's decision appeared in local newspapers prior to his receipt of a copy of our opinion. The respondent is an alien who entered this country in violation of our Immigration laws. He has

been apprehended, afforded a fair hearing and found subject to deportation under the law. He now seeks the grace of the sovereign to remain here. The fact that he was denied the favor he seeks does not amount to "trial and conviction by rumor." It merely means that after considering all the factors generally associated with the standards of the average citizen, this alien has been found to lack those standards and, therefore, unworthy of any favor on the part of the sovereign. We fail to see how the release of our decision through normal channels has prejudiced the respondent.

After careful consideration of the points raised by counsel in his motion and brief, we find in the absence of authority in support thereof that they are without merit. The motion will be denied.

ORDER: It is ordered that the motion be and the same is hereby denied.

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In the Supreme Court of the United States

October Term, 1953

No. 663

UNITED STATES OF AMERICA, EX REL. JASPERE J. MATRANGA, *Petitioner,*

v.

ARGYLE J. MACKEY, Commissioner of Immigration and Naturalization, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 214-216) is as yet unreported. The opinion of the District Court (R. 47-54) is reported at 115 F. Supp. 45.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1954 (R. 217-219). The petition for a writ of certiorari was filed on March 29, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board of Immigration Appeals could consider confidential information in determining whether to grant the privilege of suspension of deportation.

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra,* pp. 14-22.

STATEMENT

On April 6, 1951, petitioner, a native and citizen of Italy who had never been lawfully admitted into the United States, was served with a warrant, issued April 11, 1947, charging him with illegal entry into the United States on March 17, 1946[1] (R. 55-56, 57, 60, 63, 68). During March and April, 1952, petitioner was accorded a hearing in deportation proceedings (R. 57-160), at which he was represented by counsel and during which he applied for the privilege of suspension of deportation under the provisions of section 19(c) of the

[1] The reference to March 17, 1946 was erroneous, and it was later corrected by stipulation to read December 17, 1945 (R. 69).

Immigration Act of 1917, as amended, on the grounds that he had continuously resided in the United States since 1925 and was so residing on July 1, 1948, and that his deportation would result in serious economic detriment to his United States citizen wife (R. 78). The following evidence was adduced at the hearing:

Petitioner originally entered the United States on December 25, 1925, at Niagara Falls, New York, without immigration inspection and without a visa (R. 63). He failed to correspond with or to contribute to the support of his wife and two daughters, whom he had left in Italy, until 1935, at which time they joined him in the United States (R. 80, 81, 82-85, 119, 131, 132, 139-140, 157-159). His wife and daughters have since become naturalized citizens of the United States (R. 120, 131, 139-140).

In 1942, deportation proceedings were instituted against petitioner, based on his illegal entry in 1925 (R. 64). During the proceedings, petitioner was granted the privilege of voluntary departure and pre-examination (R. 65). Accordingly, on December 11, 1945, he left the United States for Canada, where he applied to the American Consul for a visa (R. 67, 65, 66). The visa was denied him, apparently on the ground that in 1930 he had been convicted in Italy, *in absentia*, "of the crime of private violence and swindling" (R. 67, 71-76, 154-155). On December 17, 1945, petitioner re-entered the United States, at Detroit,

Michigan, on the authority of his pre-examination border crossing identification card (R. 67-68). He was granted an extension of time within which to adjust his immigration status (R. 65-66), but his subsequent efforts proved futile (R. 70-75).

Petitioner admitted that he had been engaged in the "bookmaking racket" in Chicago until 1943 (R. 88). He denied that since that time he had engaged in "bookmaking" activities (R. 88, 110-111, 122-123, 126). He testified that in 1946 he moved with his family to California, where he depended for his livelihood principally upon the income derived from his activities as a cheese and grapes distributor (R. 88-92, 94). He also testified that, although his bank account showed deposits totalling $82,492 between 1946 and 1949, his income averaged less than $5,000 per year during that period (R. 96, 97, 92, 91). He explained that the bank deposits represented the payments he received for the cheese he sold and belonged to the company for which he acted as a distributor (R. 96, 97). He testified that since 1949 his income had averaged less than $1,000 per year, and that he and his wife depended for their support upon their two daughters (R. 90-91, 126, 128, 129, 133, 135, 141).

An investigative report, which was admitted in evidence, indicated that petitioner was reputed to be a "bookmaker" and that during 1951 he had intentionally avoided being served with a subpoena issued by the Kefauver Committee, holding

session in Los Angeles, California (R. 108-109, 118, 126). Petitioner's wife testified that in January 1951, after a representative of the Kefauver Committee tried to reach him, petitioner left the house, telling her that he was going on a business trip (R. 111, 113). He was absent approximately three months, during which time he failed to communicate with his family (R. 105, 112, 137).

Petitioner denied that he had absented himself in order to avoid the committee's process (R. 103, 104, 107). He explained that his trip was in connection with his efforts to venture into a new business and at the same time to take a vacation (R. 105-106, 107-108). Petitioner also explained that the statements of his friends and neighbors quoted in the investigative report, declaring that he was a bookmaker, were based upon the fact that the newspapers attributed his failure to obtain a license in 1950 for a contemplated restaurant to his alleged gambling activities (R. 109-110, 128).

On April 2, 1952, the hearing officer made his "Summary and Findings of Fact" (R. 161-168). After discussing the evidence as to deportation, he determined that petitioner "has never been lawfully admitted into the United States for permanent residence and accordingly he is amenable to deportation under the Immigration Act of 1924 on the charge stated in the warrant of arrest" (R. 161). Following his discussion of the evidence as to petitioner's "Eligibility for Suspension of Deportation" (R. 162-167), the hearing officer con-

cluded that petitioner "has not affirmatively established that he is eligible for any of the discretionary relief provided by Section 19(c) of the Immigration Act of 1917 as amended" (R. 167). He recommended that petitioner be deported (R. 168).

After petitioner filed exceptions to the hearing officer's decision (R. 172), the Assistant Commissioner of Immigration on May 23, 1952, "[u]pon consideration of the entire record, including the exceptions taken", adopted the hearing officer's "findings relating to deportability" (R. 180, 179). He ruled that, "[t]he facts and circumstances in this case do not warrant the exercise of any discretionary relief" and ordered that petitioner be deported (R. 180).

On May 11, 1953, the Board of Immigration Appeals (R. 183-186), noting that petitioner's deportability on the charge of his illegal entry "appears to be conceded as no exceptions have been taken thereto", concluded that "[t]he evidence in the file, some of it confidential in nature, establishes to our satisfaction that the alien is not a worthy subject for the administrative grant of suspension of deportation" (R. 184-186). The Board noted that the Attorney General had ruled in 1949 that the use of confidential information was authorized and that the regulations then in effect, 8 C.F.R. (1952 ed.) 243.3, authorized the consideration of "evidence, whether or not of record,

officially touching upon the question of qualification for * * * discretionary relief" (R. 185-186).

The present proceeding was initiated on June 22, 1953, in the United States District Court for the Southern District of New York by the filing of a petition for a writ of habeas corpus (R. 4-26), challenging the validity of petitioner's detention under the warrant of deportation. Petitioner alleged, *inter alia,* that he had been denied a fair hearing in the deportation proceedings because the hearing officer failed to make a finding as to petitioner's moral character (R. 12-13); that the hearing officer and the reviewing authorities abused their discretion in denying him the privilege of suspension of deportation without a lawful reason (R. 13-15); and that the hearing officer and the reviewing bodies "violated a set rule of law in considering evidence which is not part of the record" (R. 15-16).

On August 25, 1953, after oral argument on the law, the trial court dismissed the writ (R. 1, 54). With respect to the use of confidential information, the trial court held that, although the Board of Immigration Appeals, in the exercise of its discretion under section 19(c) of the Immigration Act of 1917, "relied in part upon the new regulations [8 C.F.R. (1952 ed.) 244.3] issued pursuant to the Immigration and Nationality Act of 1952" which were not applicable, the old regulations (8 C.F.R. (1951 Cum. Supp.) 151.5(a)), under which such discretion should have been exer-

cised, did not preclude reliance upon confidential information. It accordingly held that the Board in the instant case did not abuse its discretion in considering such information (R. 50-54).

On appeal, the Court of Appeals for the Second Circuit affirmed *per curiam* (R. 214-216). It found that the applicable regulations did not preclude the Board of Immigration Appeals from considering confidential information in making a discretionary determination as to suspension of deportation (R. 215-216).

ARGUMENT

The controlling regulations in force today expressly authorize consideration of confidential information in determining whether to grant the discretionary relief of suspension of deportation.[2] Since, as we show below, there can be no question of the validity of such authorization, the issue here presented affects only those few cases in which confidential information was used with respect to applications for discretionary relief pending before the new regulations went into effect on De-

[2] The regulations now provide that "the determination as to whether the application for * * * suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security." 8 C. F. R. (1952 ed.) 244.3.

cember 31, 1952. And even in this small group of cases, the superseded regulations which applied to them did not preclude reference to confidential information in determining applications for executive clemency in the form of suspension of deportation. We submit that the unimportance of the question presented and the correctness of the decision below argue decisively against the need for review.

1. There can be no doubt as to the constitutional validity of the use of confidential information in determining whether to grant the discretionary relief of suspension of deportation. It is well established that the Attorney General's power with respect to such applications, as exercised through the Immigration and Naturalization Service, is an exercise of grace, and that his decision is final and unreviewable by the courts, save in exceptional circumstances amounting to a failure to exercise any discretion at all. *United States ex rel. James* v. *Shaughnessy,* 202 F. 2d 519 (C. A. 2), certiorari denied, 345 U. S. 969; *Arakas* v. *Zimmerman,* 200 F. 2d 322 (C. A. 3); *United States ex rel. Adel* v. *Shaughnessy,* 183 F. 2d 371, 372 (C. A. 2); *United States ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, 491 (C. A. 2).[3] *United States ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876; *Ma-*

[3] In the *Kaloudis* case, at page 491, this power was likened to the "judge's power to suspend the execution of a sentence, or the President's to pardon a convict."

strapasqua v. *Shaughnessy,* 180 F. 2d 999 (C. A. 2). Congress, in granting the Attorney General such plenary power, placed no restriction on the mode of its exercise; it did not even require that there be a hearing. Cf. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260. It chose to rely upon the informed judgment of a Cabinet officer with recognized facilities for investigation, and trusted him with a power of dispensation akin to powers of executive and judicial clemency. See S. Rep. No. 1796, 76th Cong., 3d Sess., p. 2; see also H. Rep. No. 2683, 76th Cong., 3d Sess., pp. 9-10. It is clear, therefore, that, so far as the statute is concerned, the Attorney General is free, as is the President in exercising the pardoning power, to consider any information he deems relevant, from whatever source, in deciding whether an alien who meets the minimum requirements fixed by Congress is entitled to administrative grace. Cf. *Knauff* v. *Shaughnessy,* 338 U. S. 537, 542, 544; *Shaughnessy* v. *Mezei,* 345 U. S. 206.[4] The cases upon which petitioner relies (Br. 5, 8-15) are clearly inapposite, for they involve hearings to determine legal

[4] Even where statutes in terms require a "hearing" as part of the administrative process, the statutory purpose and context may justify withholding confidential information from the party entitled to be heard. *United States* v. *Nugent,* 346 U.S. 1; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294. Here, where there is no such requirement, the justification is more obvious.

rights as distinguished from matters of executive grace.

2. The 1951 regulations applicable to petitioner's case did not bar the use of confidential information by the Board of Immigration Appeals.[8] The regulations provided that if an alien applied for suspension of deportation pending a deportation hearing, he was to be "thoroughly" examined concerning his "*statutory eligibility* for such relief". 8 C.F.R. (1951 Cum. Supp.) 151.2(c)(f) (emphasis added). They further provided that the alien should have the burden of establishing that he "meets the *statutory requirements* precedent to the exercise of discretionary relief"; that "he may submit any written or oral material which he believes should be considered in the exercise of discretion by the Commissioner" (*id.*, 151.3(e) (emphasis added)); and that the hearing officer's decision should "contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, as to the alien's *statutory eligibility* for the relief requested" (*id.*, 151.5(a) (emphasis added)). But the same section declared that the hearing officer should have "no authority to exercise the Attorney General's powers" to grant discretionary relief. Under section 151.5 (e), such determination was to be made in the first instance

[8] This issue is more fully discussed in the respondent's brief in *United States ex rel. Accardi* v. *Shaughnessy*, No. 366 this Term, pp. 38-46.

by the Commissioner, who was empowered to "enter any order which he deems appropriate for the disposition of the case," subject to the alien's right of appeal to the Board of Immigration Appeals. And 8 C. F. R. (1949 ed.) 90.3 (c) provided that, "In considering and determining such appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case."

Thus, the hearing afforded by the old regulations applicable to this case gave the alien full opportunity to establish his statutory elgibility for suspension. But the Attorney General nowhere in those regulations forbade himself (or the Board exercising his discretion on his behalf) to refer to matters deemed confidential in determining whether clemency was warranted. On the contrary, the Attorney General construed the regulations to permit such action (cf. *Alexiou* v. *McGrath,* 101 F. Supp. 421 (D. D. C.)), and erased any possibility of doubt by expressly providing for it in the regulations in force today (note 2, p. 8, *supra*). We believe that the courts below correctly refused to read into the former regulations the restriction petitioner proposes. Cf. *Ludecke* v. *Watkins,* 335 U. S. 160, 171-172.[6] We

[6] The fact that the Board admittedly used confidential information does not, as petitioner suggests (Br. 4), imply that the decision was made on direction of the Attorney Gen-

submit in any event, that since the present regulations preclude any basis for a contrary argument, there is no need for review in this case.

CONCLUSION

The judgment below is correct, and the petition for certiorari presents no question of general importance. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF
Solicitor General.

WARREN OLNEY III,
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Attorneys.

MAY, 1954.

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eral without independent judgment. The petition for habeas corpus did not so allege.

On April 1, 1954, petitioner filed in the United States District Court for the Southern District of New York a second petition for habeas corpus in which he alleges that his case was pre-judged because his name appeared on a list of aliens whose deportation the Attorney General was seeking. That second petition, unlike the one here, poses the issue considered in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260.

APPENDIX

Section 19(c) of the Immigration Act of 1917, as amended, 8 U.S.C. (Supp. V) 155(c), provided in pertinent part:

> In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act [July 1, 1948]. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be

submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. * * *

8 C.F.R. (1951 Cum. Supp.) 151.2 provided in pertinent part:

§ 151.2 *Conduct of hearing—*

* * *

(c) *Hearing officer; specific duties.* At the commencement of the hearing under the warrant of arrest, the hearing officer shall (1) place the alien under oath or affirmation, (2) enter of record a copy of the warrant of arrest and explain to the alien in simple, understandable language the nature of the charges contained therein, and (3) advise the alien, if not represented by counsel or other qualified representative, that he may be so represented if

he desires and require him to state then and there for the record whether he desires such representation. Except as provided in paragraph (f) of this section, the hearing officer shall thereafter present all available evidence, including the interrogation of the alien and all witnesses presented, concerning (1) alienage, (2) date, place and manner of entry into the United States, (3) grounds for deportation, (4) factors bearing upon statutory eligibility for discretionary relief, and (5) such other information as may be pertinent to the issue of the case: * * * The hearing officer may, at such time during the hearing under the warrant of arrest as he deems appropriate, advise the alien concerning application for the privilege of departure in lieu of deportation, for the privilege of departure in lieu of deportation with the additional privilege of preexamination, or for suspension of deportation under the provisions of section 19(c) of the Immigration Act of 1917, as amended, * * * .

* * *

(f) *Assignment of examining officer in addition to hearing officer; duties of examining officer.* * * * The examining officer shall in such cases conduct the interrogation of the alien and of the witnesses on behalf of the Government and the examination or cross-examination of the alien's witnesses, present all available evidence bearing upon the alien's

liability to deportation, lodge such additional charges as he may find to be applicable, and, if the alien has applied for relief from deportation, inquire thoroughly into the alien's statutory eligibility for such relief. The hearing officer in such cases shall exercise all his regular functions not herein assigned to the examining officer, and he may, in addition, take such part in the interrogation of the alien and witnesses as he may deem necessary to assure that a full and proper hearing is held.

8 C.F.R. (1951 Cum. Supp.) 151.3(e) provided:

(e) *Application for discretionary relief.* At any time during the hearing under the warrant of arrest the alien may apply for suspension of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation with the additional privilege of pre-examination. He may apply in the alternative for more than one of these three forms of relief. The burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien. In addition, he may submit any written or oral material which he believes should

be considered in the exercise of discretion by the Commissioner.

8 C.F.R. (1951 Cum. Supp.) 151.5 provided in pertinent part:

> § 151.5 *Decision*—(a) *Preparation by hearing officer of written decision.* Except as provided in paragraph (d) of this section, the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability. If the alien has applied for relief from deportation, the decision shall also contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, as to the alien's statutory eligibility for the relief requested. The decision shall be concluded with a statement of the hearing officer's disposition of the case which shall be (1) that the alien be deported, or (2) that the warrant of arrest be cancelled, or (3) that the alien be found to have established statutory eligibility for suspension of deportation, or (4) that the alien be granted voluntary departure at his own expense in lieu of deportation, or (5) that the alien be granted voluntary departure at his own expense in lieu of deportation with the additional privilege of

pre-examination, or (6) that such other action be taken in the proceedings as may be required for the appropriate determination of the same. The hearing officer shall have no authority to exercise the Attorney General's powers under section 19(c)(2) of the Immigration Act of February 5, 1917, as amended, * * *.

* * *

(e) *Finality of decision.* The hearing officer's decision described in paragraphs (a) and (d) of this section shall be final except:

* * *

(4) When the alien or his counsel or representative files exceptions to the hearing officer's decision in conformity with paragraph (c) or (d) of this section. Every case within subparagraphs (1) to (4), inclusive, shall be referred promptly to the Commissioner and the hearing officer's decision shall be final only upon approval by the Commissioner, subject, however, to appeal to the Board of Immigration Appeals as provided in § 90.3 of this chapter. In considering such cases, the Commissioner may enter any order which he deems appropriate for the disposition of the case. Notwithstanding the provisions of this section, the Commissioner may at any time require certain classes of cases or individual cases to be submitted to him for review, and

such action by the Commissioner shall defer the operation of any disposition previously made. Upon such review, the Commissioner may adhere to the original decision or may make any other determination which in his discretion he deems appropriate. * * *

8 C.F.R. (1951 Cum. Supp.) 151.7 provided:

§ 151.7 *Submission of record to the Commissioner.* In cases in which the decision of the hearing officer requires the approval of the Commissioner as provided in § 151.5 (e), the entire record of hearing, upon completion, shall be forwarded promptly to the Commissioner by the officer in charge of the district or suboffice (a) upon receipt of exceptions as provided in § 151.5, or (b) upon expiration of the time allowed therefor, or (c) upon receipt of a waiver from the alien or his counsel or representative of the right to file exceptions to the decision of the hearing officer.

8 C.F.R. (1951 Cum. Supp.) 151.9 provided in pertinent part:

§ 151.9 *Decision by the Commissioner*—(a) *Form and finality.* The decision of the Commissioner shall be in writing and shall, unless the alien or his counsel or representative appeals to the Board of Immigration Appeals within the time specified in § 90.9 (b) of this chapter, be final.

8 C.F.R. (1949 ed.) 90.3 provided in pertinent part:

> § 90.3 *Cases appealable to the Board of Immigration Appeals; powers of Board; finality of Board decisions.* (a) When the Commissioner, or officers designated by him, exercise the power and authority of the Attorney General delegated to them by provisions of this chapter by entering orders in proceedings under the immigration, nationality, or other laws administered by the Service, such orders shall be final except that appeals shall lie to the Board of Immigration Appeals where the orders, whatever their nature (excluding mitigation of fines or penalties), arise in:
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> (2) Deportation proceedings, except as provided in § 90.10 (b);
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> * * *
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> (5) Petitions filed in accordance with section 9 (c) of the Immigration Act of 1924 for nonquota or preference quota status;
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> * * *
>
> (c) In considering and determining such appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposi-

tion of the case. The decision of the Board shall be in writing and shall be final except in those cases reviewed by the Attorney General in accordance with § 90.12.

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